



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/02082/2013

THE IMMIGRATION ACTS

Heard at : Field House

On 3rd March 2015

**Determination
Promulgated
6th March 2015**

Before

**UPPER TRIBUNAL JUDGE KEBEDE
UPPER TRIBUNAL JUDGE PITT**

Between

**A B
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms V Mascord, of Lawrence Lupin Solicitors

For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant's appeal comes before us following a hearing on 12 May 2014 at which errors of law were found in the decision of the First-tier Tribunal dismissing her appeal against the respondent's decision to deport her from the United Kingdom pursuant to regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations").

2. The appellant is a citizen of Poland, born on 18 December 1982. She first entered the United Kingdom in 2007 to work and study. She came to the

adverse attention of the UKBA when she was arrested on 17 April 2010 for the index offences.

3. The circumstances of the appellant's offences are that on 18 April 2010 she shook her three month old daughter several times in order to stop her crying, as a result of which her daughter suffered severe and life-threatening injuries leaving her brain-damaged, confined to a wheelchair and blind. That occurred at a time when the appellant was on her way out to meet a male who had been in contact with her via a sex search website and after which she left her daughter with her partner, the child's father, who subsequently, when it became clear to him that the child was seriously unwell, telephoned the emergency ambulance service. Both the appellant and her partner were found to have lied about the circumstances under which their daughter had suffered her injuries. Since that time their daughter had been placed in foster care and neither parent was assessed as suitable to have custody of her.

4. On 21 May 2012 the appellant was convicted of inflicting grievous bodily harm and perverting the course of public justice. On 21 June 2012 she was sentenced to three years and two years imprisonment, the terms to run concurrently. She did not appeal against her conviction or sentence.

5. On 10 October 2012 the appellant was notified of her liability to deportation and on 7 October 2013 the respondent made a decision to deport her under regulation 21 of the EEA regulations, on the grounds that she posed a genuine, present and sufficiently serious threat to the interests of public policy.

6. In her reasons for deportation, the respondent considered that, in view of the absence of adequate evidence of continuous residence in the United Kingdom under the EEA regulations, the appellant had not established a right of permanent residence. On the basis of the NOMS ("National Offender Management Service") assessment made by her Offender Manager, who found that she posed a medium risk of harm to her child, a low risk of re-offending and a medium risk of harm should she re-offend, the respondent considered that the appellant had a propensity to re-offend and continued to pose a risk of harm to the public. It was considered that her deportation to Poland would not prejudice the prospects of her rehabilitation and that the decision to deport her was proportionate and in accordance with the principles of regulation 21(5). It was considered further that her deportation would not breach her Article 8 human rights.

7. The appellant appealed against that decision and her appeal was heard before the First-tier Tribunal by a panel consisting of First-tier Tribunal Judge Kimnell and Dr P L Ravenscroft. The panel noted the concession made on behalf of the appellant that she was not entitled to permanent residence and accordingly could not benefit from the enhanced protection against deportation under the EEA regulations. They concluded that she posed a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and that the decision to deport her was proportionate and in accordance with the EEA regulations. They also found that her deportation would not breach Article 8 of the ECHR and accordingly dismissed the appeal on all grounds.

8. Permission to appeal against that decision was sought, inter alia, on the grounds that the Tribunal had erred by taking into account a reference in a social services report to “old bleeds”, rather than considering the facts as they were before the sentencing judge who had noted that the offence was isolated and out of character; that the Tribunal had paid insufficient regard to the conclusions in the pre-sentence report and OASys report as to the risk of re-offending and had wrongly concluded, in the light of such evidence, that the appellant remained a threat; and that the Tribunal had wrongly approached the question of the public interest.

9. Permission was granted on 14 March 2014.

10. At an error of law hearing on 12 May 2014 we found the Tribunal’s determination to be materially flawed by reason of errors of law and accordingly set it aside, for the following reasons:

“9. We have carefully considered the submission made by Mr Tufan, that the reference by the Tribunal, at paragraph 71 of its determination, to “old bleeds” was no more than a reference to the evidence and that it was not central to the determination. However, we cannot accept that that is the case. Whilst the Tribunal was entitled to refer to the evidence before it, what it was not entitled to do was to make assumptions from that evidence that appear to be speculative and unsupported. Yet that is what it seems to have done. Reading paragraph 71 as a whole, it seems to us that there is a clear suggestion that there was a history to the appellant’s daughter’s injuries going beyond the one incident leading to her conviction. However there was nothing in the conclusions reached by the probation services in any of their reports to support such a suggestion and indeed it ran contrary to the observation of the Sentencing Judge that the offence was “mercifully isolated and...out of character”. On the other hand, there was evidence before the Tribunal that the appellant posed a low risk of re-offending, yet there was nothing in the Tribunal’s findings to show that it took account of that evidence. Indeed, the Tribunal’s assessment of risk and propensity to re-offend was extremely limited and, as such, paragraph 71 appears to have been central to its conclusions with respect to regulation 21(5).

10. Accordingly, and in view of the absence of full and proper reasoning to support the conclusions reached in regard to the question of risk, we find that the decision is not a sustainable one and that it has to be set aside.

11. We do not consider that we are able, at this point, simply to go on and re-make the decision ourselves and accordingly we shall list the appeal for a resumed hearing at which further submissions can be made by the parties. We see no need for further oral evidence, since the primary facts are not in dispute. However it may be that limited oral evidence would be necessary to address any change in circumstances if appropriate. It would be helpful to have a further report from the probation services in regard to the risk of re-offending.”

11. The appeal came before us for a resumed hearing on 3 March 2015, by which time a further report had been produced by the National Probation Service in regard to the risk posed by the appellant.

12. The appellant adopted as her evidence a new statement confirming that she was no longer in a relationship with the father of her child. The parties then made submissions before us.

13. Ms Everett referred to the probation report in which the appellant was assessed as a low risk of re-offending and a medium risk to children and submitted that a low risk was still a risk. Safeguarding measures had been put in place, namely no access to her daughter and no access to children under 16, and that was because she posed a risk. She had not integrated into society in the United Kingdom. She met the test in Regulation 21 of the EEA Regulations and the deportation decision should therefore be upheld.

14. Ms Mascord submitted that the test had not been met and the appellant did not pose a sufficiently serious threat. Exclusion was a last resort and the safeguarding measures were in place to avoid that. Since the appellant was not a threat it was not necessary to consider integration.

Consideration and findings

15. It is not in dispute that the appellant is entitled only to the lower level of protection afforded under the EEA Regulations. Accordingly, her expulsion can be justified only on the general grounds of public policy, public security or public health, the relevant test for which is to be found in regulation 21(5), as follows:

“21(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles—

- (a) the decision must comply with the principle of proportionality;
- (b) the decision must be based exclusively on the personal conduct of the person concerned;
- (c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;
- (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;
- (e) a person’s previous criminal convictions do not in themselves justify the decision.”

16. In the case of Essa v Secretary of State for the Home Department (EEA: rehabilitation/integration) Netherlands [2013] UKUT 316 the Upper Tribunal made the following observation at paragraph 32:

“... for any deportation of an EEA national or family member of such national to be justified on public good grounds (irrespective of whether permanent residence has been achieved) the claimant must represent a present threat to public policy. The fact of a criminal conviction is not enough. It is not permissible in an EEA case to deport a claimant on the basis of criminal offending simply to deter others. This tends to mean, in case of criminal conduct short of the most serious threats to the public safety of the state, that **a candidate for EEA deportation must represent a present threat by reason of a propensity to re-offend or an unacceptably high risk of re-offending.** “

17. In line with that observation, we turn to the question of propensity to re-offend or risk of re-offending. In that respect the relevant evidence addressing that question is the most recent report from the National Probation Service, dated 28 November 2014, together with the earlier pre-sentence report of 14

June 2012 and the OASys report of 27 August 2012. In all of those reports the appellant was assessed as a medium risk to children, a low risk to the public and a low risk of re-offending.

18. In the pre-sentence report of 14 June 2012, the appellant's probation officer found that the appellant posed a "*low likelihood of re-offending bearing in mind her background information and lack of any previous offending*" and that, whilst she posed a risk of harm, she did not pose an imminent risk of offending and did not cross the dangerousness threshold.

19. The OASys report defined the "medium risk" that the appellant posed to children in the following terms: "*there are identifiable indicators of risk of serious harm. The offender has the potential to cause serious harm but is unlikely to do so unless there is a change in circumstances...*". We note in particular the reference to the appellant being "*unlikely*" to cause serious harm unless her circumstances change. As regards those circumstances, it is relevant to note that the appellant has the benefit of secure accommodation with her brother or sister upon her release and has, in the past, had no problem finding employment, but in any event has the support of her siblings.

20. In the most recent report of 28 November 2014, the probation officer assessed the appellant as follows:

"In terms of the risks [she] poses to society and members of the public I have employed the National Probation Service assessment tools namely the Offender Assessment System (OASys) and Offender Group Reconviction (OGRS) and she has been assessed as the following - Low risk of reoffending and medium risk to children, however, it is my assessment this is at the lower end of the spectrum as [the appellant] will not have access to the victim...

It is my further view that it is unlikely that [the appellant] will offend in a similar way as she now has the ability to generate pro social alternative problem solving solutions in the community and there is also a newfound maturity.

It is my assessment that [the appellant] should be afforded another opportunity to remain in the United Kingdom. I believe that she has learnt a very difficult and painful lesson which will remain with her for the rest of her life."

21. It is a significant feature of this case that the appellant's offence was an isolated one, committed against her own child at a time when she was under particular stress, and was apparently out of character and that she has shown genuine remorse. That was indeed accepted by the Sentencing Judge who commented in like terms, that the offence was "*mercifully isolated and ... therefore out of character*" and that the appellant appeared to be "*genuinely remorseful*". The appellant has no access to her daughter and, as part of the terms of her licence, is not able to have any access to children under the age of 16.

22. In such circumstances, having had regard to the views of those professionals best placed to assess her level of risk and the risk of re-offending, we find insufficient evidence to suggest that the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, such interests in this case being the protection of vulnerable children, as accepted in the First-tier Tribunal.

23. We do not see how the fact that safeguarding measures have been put in place indicates in itself that the appellant poses a threat, as suggested by Ms Everett, when those measures are precautionary and when, as a result of those measures, the appellant will simply have no access to children at all. It is not the case, in any event, that the risk the appellant poses is mitigated solely by the fact that those safeguarding measures are in place, but the most recent report indicates that the appellant has herself developed the necessary tools to address such issues, with her *“ability to generate pro social alternative problem solving solutions in the community and... newfound maturity”*. As for Ms Everett’s submission that low risk does not mean no risk, that must be correct but, in our view, when taken together with the other comments made by the probation services, does not amount to showing that she poses a genuine, present and sufficiently serious threat.

24. Having come to that conclusion, that has to be the end of the matter and the appellant’s exclusion cannot be justified on grounds of public policy since one of the mandatory elements of the test in Regulation 21(5) cannot be met. There is no need to go further and consider integration and proportionality, but in any event expulsion would clearly not be proportionate if the appellant does not pose a genuine, present and sufficiently serious threat.

25. We consider it necessary to stress at this point that considerations that would have been significant and relevant in a non-EEA deportation case, such as deterrence and public revulsion, simply do not apply in this case. We are fully aware that the appellant’s offence was a shocking one and that the repercussions are extensive, leaving a young child permanently disabled and with the prospect of a truncated life. Had this been an ordinary deportation case such other considerations, taken together with the appellant’s circumstances in general, may well have led us to conclude that deportation was justified and in the public interest. However the appellant is an EEA national and, as such, she benefits from the protection of the EEA Regulations to which we are required by law to defer.

26. Accordingly we find that there is only one decision we are able to reach, namely that the appellant’s deportation would be in breach of the EEA Regulations.

DECISION

27. The making of the decision of the First-tier Tribunal involved an error on a point of law and the decision has accordingly been set aside. In re-making the decision, we allow the appeal under the EEA Regulations.

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. We continue that order, pursuant to pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Date **3rd March 2015**
Upper Tribunal Judge Kebede